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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

COMMENTS

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SUMMARY

The National Association of Black Owned Broadcasters, Inc. ("NABOB") proposes that the Commission adopt the following specific proposals to encourage minority ownership in Personal Communication Services ("PCS") and the other radio services to which the competitive bidding policies will be applied. The Commission should accord minorities the following preferences and enhancements in the bidding process:

1. Any minority enhancement factors or preferences should be applied to any frequency block for which a minority entity bids, not merely the frequencies which have been set aside for the designated entities.
2. Minorities should receive a 25% bonus added to their bids such that any bid from a qualified minority entity should receive bid credit for \$125 for every \$100 bid.
3. Minority bidders should be allowed to pay their bids off over a seven year period.
4. Investors in minority owned entities should be allowed to obtain all of the tax certificate benefits currently accorded investors in minority owned broadcast stations and cable systems.
5. The Commission should liberalize its financial certification policies for minority owned entities.

In addition, NABOB submits the following suggestions with respect to the principles and procedures which should govern the actual auction process:

1. The bidding process should be conducted in small increments.

2. The Commission should not allow regional or national bidding.
3. Consortia and "combinatorial" bidding should not be used as a means of allowing bidding for several MTAs or BTAs at once.
4. The Commission should use oral bidding procedures.
5. The bidding should be conducted by MTA areas such that all MTA and BTA frequencies in an area are bid within a single bidding session.

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To: The Commission

COMMENTS

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorneys, hereby submits its Comments in the above-captioned proceeding. NABOB submits that an unstructured competitive bidding process poses a very high risk of eliminating any meaningful participation by African American entrepreneurs in Personal Communication Services ("PCS") and other services to which competitive bidding may be applied. NABOB submits that the Commission must adopt policies which aggressively promote minority ownership in the competitive bidding process. In support of its position, NABOB submits the following:

I. NABOB HAS A SUBSTANTIAL INTEREST IN THIS PROCEEDING

NABOB is the trade association representing the interests of the African American owned commercial television and radio stations, and cable television systems throughout the United States. In that capacity, NABOB has two principal objectives: (1)

to increase the number of African American owners of communications facilities and (2) to improve the business climate in which they operate.

II. THE CONGRESS HAS DETERMINED THAT THERE IS AN IMPORTANT GOVERNMENT INTEREST TO BE PROMOTED BY ENCOURAGING MINORITY OWNERSHIP AND CONTROL OF THE SERVICES FOR WHICH THE COMPETITIVE BIDDING PROCESS IS BEING CONSIDERED

The telecommunications industry is undergoing rapid technological change. The dividing line between broadcast and non-broadcast services has almost disappeared. The exact nature of the services to which the new competitive bidding procedures will apply is not yet known. However, it is clear that the services will be intimately involved in shaping the distribution of information and ideas into the 21st century.

The Congress, in the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), has directed the Commission to make certain that it accords minorities the opportunity to participate in the services to which the competitive bidding procedures will apply. 47 U.S.C. 309(j)(4)(D). In complying with this mandate, the Commission must recognize that the legal basis for this directive rests on two separate justifications.

First, Congress has recognized for many years that there are important First Amendment reasons for promoting the ownership and control of communications facilities by minorities. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-563 (1990). While this justification has historically been directed by Congress to

traditional "mass media services," it is clear that the dividing line between mass media services and the communication services to which these competitive bidding procedures will apply has now essentially disappeared. Recognizing the elimination of that distinction, Congress has extended the minority ownership policy to the services at issue in this proceeding.

In addition, Congress has separately recognized that to remedy past discrimination, minorities must be given assistance in obtaining economic opportunities in our society. This second objective has been recognized by Congress in connection with a number of legislative actions in which no first Amendment issues were involved. See Fullilove v. Klutnick, 448 U.S. 449 (1980).

III. THE COMMISSION'S COMPETITIVE BIDDING PROCEDURES MUST BE GUIDED BY SPECIFIC PRINCIPLES DESIGNED TO PROMOTE MINORITY OWNERSHIP

The competitive bidding process must be guided by some basic principles designed to promote minority ownership and control of PCS systems and other radio services.¹ These principles are as follows:

1. The bidding process should be conducted in small increments. NABOB proposes that at any given auction the Commission should make only limited amounts of spectrum available for bidding. This procedure would allow minority companies to be able to direct their limited resources to a limited number of

¹The issues NABOB discusses throughout these Comments are generally directed at PCS, although it is not NABOB's intent to limit them solely to that service.

auctions without missing out on the opportunity to participate in subsequent auctions, if they are not the successful bidder for earlier auctions.

For example, assume that a minority bidder has a plan to bid \$25 million for two MTAs at a price of \$12.5 million per MTA. If the bidder goes to the auction and finds that the successful bid for each MTA is \$20 million, he or she should be given an opportunity to go back to his or her funding source and to review his or her business plan to decide whether to bid at the \$20 million dollar level for a single MTA in a subsequent auction. If large numbers of MTAs or BTAs are opened for bids at one time, a minority bidder with limited resources may have inadequate opportunity to adjust to a fall-back position after an unsuccessful bid for his or her first choice of MTAs or BTAs.

2. The Commission should not allow regional or national bidding. Consistent with the above principle of bidding in small increments, the Commission should not allow regional or national bidding. There are only 47 MTAs upon which the Commission will allow parties to bid for PCS.² This means that some of these MTAs will encompass one or more states. Each of these MTAs is a huge geographic area covering millions of people. It is difficult to accept the argument that a company cannot establish a viable business with a single MTA. However, even if it is correct that a company cannot establish a viable business with a single 30 MHz

²Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-451, released October 22, 1993 (The "PSC Order").

license in an MTA, disallowing regional and national bidding will not preclude large companies from successfully bidding for as many MTAs as they wish as those MTAs become available. The Commission should not be in the business of reinventing monopolies (If monopolies were the goal, why break up AT&T?).

3. Consortia bidding should not be used as a means for allowing bidding for several MTAs or BTAs at one time. It is very unlikely that minority owned companies will be invited to join consortia of large companies seeking to engage in regional and national bidding. The development of the cellular radio industry (and the development thus far of PCS) demonstrates that minorities are not sought out by telephone and other companies as business partners in the businesses for which competitive bidding is contemplated. Thus, any system for consortia or "combinatorial" bidding can only be expected to work against the interests of minority companies. If consortia are formed for bidding they should still be limited to bidding for one MTA or BTA at a time.

4. The Commission should adopt policies which encourage large companies to bid jointly with minority controlled companies for the MTA and BTA licenses. The Commission's proposed procedures for PCS licensing assume that major telephone companies and cellular telephone companies will be the principal companies bidding for PCS licenses. NABOB's investigation of the potential PCS industry leads us to agree that the most likely bidders for PCS licenses will be those companies which current dominate the common carrier services. However, NABOB submits that the Commission should not

simply accept this concept and continue to relegate minorities the "crumbs" of the various services, in this instance to bidding solely for the frequencies proposed for the designated groups specified in the Budget Act.

"Diversity of ownership" is not a Commission policy which should apply only to broadcast services. This established basis of the Communications Act led to the adoption of the various existing minority ownership policies, each of which were designed to afford minority entrepreneurs a necessary "boost" to bring some semblance of equality to the very unequal circumstances in which have traditionally operated. The Commission cannot let the "heat" of the superhighway moment blind it to the impact of its actions upon the future of minorities in telecommunications. The Commission should make certain that its policies encourage major companies planning to bid for the desirable MTA areas to join with minority owned companies to bid for those areas. Below NABOB submits proposals designed to encourage such joint bidding.

IV. NABOB PROPOSALS FOR THE BIDDING PROCESS

Based upon the principles set forth above, NABOB submits the following proposals for the bidding process:

1. Use oral bidding procedures. The Commission's analysis of the various potential bidding options clearly demonstrates that the oral bidding process is by far the most desirable. As noted above, the Commission should adopt bidding procedures which allow bidders as much information about the process as possible so that bidders

can change their strategies and objectives as the realities of the bidding process unfold. Sealed bid and similar bidding procedures, which require bidders to make many commitments without knowing whether they have been successful in their initial endeavors, will severely restrict the opportunities for bidders with limited resources.

In this regard, it should be noted that the Commission is going to require some type of financial certification with the application filing. A bidder with financing available for a limited number of bids should not be precluded from bidding in subsequent MTAs or BTAs simply because all of his or her financial resources were tied up in earlier bids for which he or she was not the successful bidder. The oral bidding procedure, coupled with the proposals above for doing small numbers of MTAs and BTAs in each auction, will allow losing bidders to redeploy their unsuccessfully allocated resources immediately for subsequent bidding opportunities.

2. Bidding should be conducted in MTA areas for all MTA and BTA frequencies in that MTA. The Commission notes in the NPRM that deciding the order for issuance of licenses will be very difficult. However, NABOB submits that the following proposal may result in the balancing of a number of competing interests. It appears that much of the Commission's NPRM is concerned with enabling major companies to determine whether they will be able to aggregate large amounts of spectrum so that they can expand services over extended geographic areas to obtain a large potential customer base. NABOB

proposes that the Commission auction frequencies in the following order:

- a. Auction the MTAs in an order based upon those containing the largest metropolitan areas within the MTA. For example, the Commission would auction the MTA containing New York City first; the MTA containing Los Angeles second; the MTA containing Chicago third, etc.
- b. Once the Commission begins auctioning an MTA, it should auction all frequencies within that MTA, both MTA frequencies and BTA frequencies. This process proposes, for example, that once the Commission starts auctioning frequencies in which the MTA in New York is located, it auction all frequencies in that MTA, both MTA frequencies and BTA frequencies. The basis for this proposal is that, before going to bid for Los Angeles or Chicago, a bidder would probably need to know that, while he or she did not obtain an MTA license covering New York City, he or she did obtain a BTA license for that area.

V. THE COMMISSION SHOULD ADOPT A BROAD GROUP OF INCENTIVES AND PREFERENCES TO PROMOTE MINORITY OWNERSHIP IN THE SERVICES TO WHICH COMPETITIVE BIDDING WILL BE APPLIED

The Commission has set forth a number of proposals for providing minorities some assistance in the competitive bidding process. However, the Commission's apparent notion that perhaps one or two of the proposals might be appropriate fails to adequately recognize the magnitude of the problems confronting

minorities seeking to enter PCS and other businesses. The short response to the Commission's suggestions with respect to minority preferences is that virtually every proposal discussed by the Commission needs to be applied, not separately but collectively. In making this argument for the provision of some manner of preference for minorities in the grand scheme of the "information superhighway", NABOB would be remiss if it did not note, once again, the very sad irony of a black organization being required to assume a "defensive" posture when attempting the redress the devastating effects of racism on all aspects of minority life, both social and economic. It is the ultimate in perverse "victim bashing" that a request for "fair treatment" is twisted into "seeking special favor".

NABOB submits that the Commission should adopt the following policies to encourage minority ownership in the competitive bidding process:

1. All minority enhancement factors should be applied across the board, regardless of the spectrum band for which the minority entity bids. Before describing the specific proposals for enhancing the bids of minority bidders, NABOB submits that the Commission should apply all minority enhancement factors to all bids by qualified minority owned entities, regardless of the frequency block for which the entity has bid. This point is critical given the concern raised regarding the frequencies which the Commission has proposed for set aside for the designated entities in PCS. Those frequencies are clearly not the largest

frequency blocks and may have other drawbacks which make them undesirable. (See dissent of Commissioner Barrett in the PCS Order.) In addition, by applying the minority enhancement factors to a minority bid in any spectrum band, the Commission will stimulate nonminority companies to joint venture with minority owned companies in all spectrum bands.

2. Minority groups should have a bonus added to their bids. The key to the bidding process is having the highest bid. All other incentive benefits for minority bidders are of no consequence if the minority does not have a clear chance of being the winning bidder. For all of the historical reasons of which Congress was aware when it passed the Budget Act, minorities will have great difficulty amassing the capital needed to bid the highest amount in most auction situations. Therefore, the Commission must adopt procedures which accord minorities extra credit for their bids.

Essentially, NABOB proposes that a bid by a minority owned company of \$100 should be treated as if it is for $\$100 + X$. This approach has been used in other government programs to promote similar goals of minority inclusion in business opportunities. In adopting such a procedure, the difficult point is coming up with the correct amount for "X." A number too small for "X" will have no meaningful benefit for minorities. On the other hand, a number too large may lead to legal attacks on the process by competing bidders. NABOB submits that a bid increase factor of 25% would draw the correct balance between these two competing interests.

Thus, a bid by a minority for \$100 would be treated by the Commission as a bid for \$125.

3. Minority bidders should be able to pay their bids off over time. NABOB submits that, after an initial deposit of 10% of the bid amount, winning minority bidders should be allowed to pay the balance of their bid amount, interest free, over a period of seven years, beginning on the date that the system receives its first revenues from customers.

4. Investors should be able to obtain a tax certificate for the sale of a less than controlling interest in a minority owned and controlled entity. The tax certificate has been a very effective tool in encouraging minority ownership in the broadcast industry. It should be applied to the services at issue in this proceeding to the same extent and in the same manner that it is currently applied in the broadcast industry.³

5. The Commission must liberalize its policies with respect to financial certification. The Commission has a long history of holding applicants to stringent financial certification standards. In the broadcast area the cases in which minorities have been disqualified on financial certification grounds are rampant. NABOB submits that this long line of deficient financial certification cases is the fault of the Commission's overly stringent financial certification requirements.

³There is currently pending a Petition to expand the tax certificate. NABOB submits that the Commission should act favorably on the proposals contained in that Petition, and that, upon adoption, those policies should also apply to the services at issue in this proceeding.

The Commission should establish financial certification policies which recognize that the Commission is asking bidders to certify that they have funds to initiate service in a business for which they can show the financing source no license, no firm assurance of obtaining a license, and, in the case of PCS, a business in which there is no industry history. The typical minority owned business is not likely to be able to obtain a firm financing commitment to initiate service for such a bid.

The Commission should adopt the recommendation of its Small Business Advisory Committee and allow minority bidders to use what the Commission has previously characterized as "letters of interest," rather than commitment letters, to demonstrate their financial qualifications. In addition, minority entities should be allowed to utilize such letters from Small Business Investment Companies ("SBICs") and Specialized Small Business Investment Companies ("SSBICs") to demonstrate their financial qualifications. The House Banking Committee has recently publicized reports detailing the banking industry's admitted practice of redlining in its mortgage lending practices. The banking industry admitted that it rejected minority (black) applicants at a rate far higher than any other applicant group in instances where the applicants 'credentials', other than race were equal. It would be foolishly naive for the Commission or NABOB to assume that the banking industry's discriminatory practices extend only to mortgage lending and that in every other circumstance blacks are treated "just like everyone else." It is for that reason that NABOB urges the

Commission to allow financial flexibility so that the "old-boy" banking network cannot be used to unfairly influence the development of the information superhighway.

VI. THE COMMISSION'S POLICIES TO PREVENT UNJUST ENRICHMENT SHOULD BE CAREFULLY TAILORED

The Budget Act seeks to prevent unjust enrichment. This provision was apparently added to the Budget Act because of a great deal of publicity given to a handful of transactions in which minorities appeared to be "fronts" for nonminority owned companies. NABOB does not support front companies. Indeed, such companies do harm to the positive objectives the Commission's policies are designed to achieve.

Nevertheless, the Commission must be careful in promoting policies designed to prevent the use of front companies. As the Commission is well aware, many bidders, particularly those pursuing PCS licenses, will need to join forces with major corporations in order to obtain the financial resources needed to bid for and construct PCS systems. In such instances, the joint undertakings may be somewhat financially lopsided. However, the mere coming together of two entities of disproportionate size does not mean that the smaller entity is a "front" for the larger.

The potential for one company to be a front exists only where the larger entity enters into the venture with a predetermined ability to: (1) buy-out the smaller entity's interest, (2) within a short period of time (less than three years), (3) at a price

substantially lower than the value which should be attributed to the equity interest ostensibly held by the minority owner. Absent all three of these elements, NABOB submits that the Commission should not assume that such a joint undertaking is a "front" arrangement.

VII. THE COMMISSION MUST ACCORD PREFERENCES AMONG THE DESIGNATED GROUPS WHICH TAKE ACCOUNT OF THE UNIQUE HISTORY OF DISCRIMINATION AGAINST MINORITIES

The Budget Act listed a group of designated entities for whom the Commission is to adopt special procedures in the competitive bidding process. Congress did not require that the Commission provide similar benefits to each of these entities. The long history of Congressional, court and Commission actions documenting the need for and justification for special programs to encourage minority ownership of communications facilities, requires that the principal policies proposed in these Comments should be accorded only to minority owned entities.

It is not NABOB's desire to be placed in a position where it must fight with other designated entities for what may prove to be the crumbs of the auction process. However, NABOB submits that the case for special consideration for minority owned entities, particularly African Americans, is much more fully documented than for the other designated entities. The need for such special consideration traces its roots back to a history of slavery, which none of the other designated entities can claim.

Therefore, NABOB submits that the tax certificate policy which is the linch-pin of the current Minority Ownership Policy must be retained as such, and should not be extended to any other "designated entity." To do otherwise would lead, inevitably, to the erosion of the Policy as a whole. NABOB would similarly restrict to the province of minority bidders, the application of the 25% bonus proposal. In addition, NABOB sees no basis for according rural telephone companies any preferences outside of rural areas. Further should the Commission adopt preferences or enhancement credits other than those proposed herein by NABOB, the Commission should apportion those preferences or enhancements to accord minorities a greater preference or enhancement than the other designated entities.

VIII. CONCLUSION

The Commission has before it a very difficult task in implementing the competitive bidding legislation at issue in this proceeding. The obligation imposed by Congress to assure that minorities are included in this process comes with a long history of efforts to bring minorities into meaningful ownership in the telecommunications industry. The proposals submitted by NABOB in these Comments are intended to assure that the Commission's efforts are consistent with the statutory mandate. The objective is to produce meaningful results. There are virtually no minorities in the radio services to which the competitive bidding procedures will apply. Without the broad policies proposed here, the Commission is

not likely to even marginally change the abysmal underrepresentation of minorities in these services. NABOB therefore, urges the Commission to adopt the procedures and policies proposed here.

Respectfully submitted,

**THE NATIONAL ASSOCIATION OF BLACK
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